BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VICTOR S. PRICE Claimant VS. **ROBERT TODD BAKER d/b/a** **SUNSHINE LAWN & TREE SERVICE** Respondent AND **OWNERS INSURANCE COMPANY** Insurance Carrier	)	Docket No. 1,058,418

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the January 5, 2012, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard. Daniel L. Smith, of Overland Park, Kansas, appeared for claimant. Michael T. Halloran, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant's action was not willful as defined by case law and, therefore, found his workers compensation claim compensable. The ALJ ordered temporary total disability benefits to be paid by respondent commencing November 15, 2011, until claimant is released to any substantial or gainful employment. Further, the ALJ ordered the parties to agree upon a specialist to treat claimant's injury.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 3, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues the claimant failed to use or properly use safety equipment provided by respondent. Respondent contends the ALJ applied an incorrect burden of proof in deciding the case and also used old case law concerning willful failure which is

inapplicable under the act as amended. Respondent asks the Board to reverse the ALJ's Order and find that claimant is not entitled to workers compensation benefits.

Claimant argues respondent failed to establish its defense of noncompensability as the evidence showed negligence but not willfulness. Accordingly, claimant asks the Board to affirm the ALJ's Order.

The issue for the Board's review is: Did claimant willfully fail to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer or recklessly violate a safety rule?

FINDINGS OF FACT

Claimant applied for a job with respondent on September 23, 2011. On his application, he indicated he was skilled in the use of power tools, bucket truck operation, climber, clean up and pruning and shaping. He told respondent's owner, Robert Todd Baker, that he had five years of experience. Before Mr. Baker hired claimant, he watched claimant perform a simple job. Mr. Baker said claimant correctly used a rope and harness on that job. After watching claimant, Mr. Baker hired him. Claimant said he was instructed on the proper use of the two-point safety harness before his injury.

Mr. Baker testified that within one to two weeks after claimant started working for respondent, he was checking on a job and saw claimant in a tree with no rope or lanyard. Nor was claimant wearing a safety harness. Mr. Baker testified he told claimant to get out of the tree and not to be in a tree again without his safety gear. Mr. Baker considered the minimum safety gear needed was a safety harness, lanyard and rope. Claimant, however, testified that Mr. Baker had never said anything to him before the accident about his use of safety equipment.

Claimant testified that on the day of his accident, he had finished trimming the first of three trees. He said he had not used a rope in the first tree because there was a power line and fence below him. Claimant said he started cutting a limb on the second tree using a pruning saw with an extension pole. He testified that Mr. Baker saw him and instructed him to climb into the tree to cut the limb. Mr. Baker also pointed out to claimant and a coworker, Jerry Doyle, some brush that needed to be cleared. Mr. Baker then left the premises. Claimant said he climbed into the second tree using a ladder, climbing spikes, a safety saddle, a lanyard and a safety harness. He said work on the second tree was complicated by power lines, cable drop lines and a fence. He stated he could not use a rope because of the power line and fence below the tree. Claimant said when he was about 20 feet into the tree, he was properly using the safety harness.

Claimant said at some point it became necessary for him to detach the lanyard from the safety harness to reposition himself in order to make a cut. Claimant said that while the lanyard was unclipped, he tried to position himself in the tree. In doing so, he lost his

footing and fell, hitting a power line and then falling to the ground. He estimated he fell about 20 feet, landing on his left foot and causing it to become fractured

After claimant fell, he climbed back into the tree and completed the job. Other colleagues observed him working after his fall, and no one told him he was not correctly using the equipment.

Mr. Baker testified that on the day of claimant's injury, he saw claimant in the first tree. He said claimant was using a rope, lanyard and belt. Mr. Baker said claimant's contention that one should not use a rope when working over power lines was ridiculous. Mr. Baker said the rope would be tied into the middle of the tree. When the work on the branch was complete, you would rappel down the tree trunk, past the lines, straight down to the ground.

After claimant finished the first tree, Mr. Baker saw him standing on the ground using a pruning saw on the second tree. Mr. Baker told claimant not to use the pruning saw because it was over claimant's head and barely reached the limb. Also, Mr. Baker said if claimant would have made the cut, the limb would have broken and taken out the power line.

Matthew Bauschka is employed by respondent as a crew leader/climber. He trims trees, cleans trees and takes trees down. When he climbs, he uses a harness and rope together for the majority of jobs. The only time he would not use a rope is on a pine tree because it is a straight up climb and the lanyard is all that is necessary.

Mr. Bauschka considered claimant to be an experienced climber and appeared to use the rope and lanyard properly. A few days after claimant started, Mr. Bauschka saw claimant working without a rope and a lanyard. He told claimant he had to use both the rope and lanyard at all times. Claimant responded by stating that Mr. Bauschka should not to tell him how to do his job because he had more experience than did Mr. Bauschka. Later, Mr. Bauschka saw Mr. Baker reprimand claimant for not using the rope and lanyard. Mr. Bauschka did not agree with claimant's statement that he could not have used a rope while trimming branches from the tree because it was above power lines. Mr. Bauschka would have approached the limb using a rope because there are too many opportunities for something to go wrong.

Mr. Bauschka said that both a lanyard and rope were available to claimant the day of the accident. Also, Mr. Bauschka said that before claimant climbed into the second tree, he offered to remove the limb himself using the bucket truck. He said claimant did not make any comment to his offer. Claimant denies that Mr. Bauschka made the offer of the use of the bucket truck.

Although Mr. Bauschka was on the property at the time of claimant's fall, he did not observe the fall. Mr. Bauschka saw claimant and Jerry walking away from the tree, and

he asked them what was up. He said claimant laughingly responded that he had just fallen out of a tree. Mr. Bauschka first thought claimant was joking. When he saw claimant, claimant's lanyard was doubled up and hooked on, which is typically the position the lanyard is in when it is not being used. Mr. Bauschka testified claimant told him he had been using unsafe practices by not lanyarding in and walking out on the limb; claimant further said his lanyard caught on to some brush and yanked him, causing him to lose his balance.

Jerry Doyle, Jr., is employed by respondent and was present on the date of claimant's accident. He testified that when claimant was working on the first tree that day, he was using a rope and had a belt. And claimant was trimming limbs from over the power lines. After claimant climbed down from the first tree, Mr. Baker told Mr. Doyle and claimant to clean some brush. After Mr. Baker left, claimant put a ladder up to the middle tree. Mr. Doyle offered him a rope but claimant said he did not need it. Mr. Doyle did not see claimant get into the tree. But he did see claimant fall. He said he came around a building and saw claimant hanging by his hands trying to get his feet back up on the limb. Claimant was not attached to the tree with a lanyard. When claimant fell, he hit a power line, and it sprang claimant forward and he landed on the ground with his feet straight down. Mr. Doyle went over to claimant and asked claimant if he was okay. In so doing, he noticed that claimant had his belt on but the lanyard was clipped. Claimant told Mr. Doyle: "[I]t was my stupidity because I should have used safety equipment . . ."[1]

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

L. 2011, ch. 55, sec. 3 amends K.S.A. 2010 Supp. 44-501 and states in part:

> (a)(1) Compensation for an injury shall be disallowed if such injury to the employee results from:
>
> (A) The employee's deliberate intention to cause such injury;
>
> (B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;
>
> (C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;

[1] P.H. Trans. at 74-75.

> (D) the employee's reckless violation of their employer's workplace safety rules or regulations . . . .

"When the legislature revises an existing law it is presumed that the legislature intended to change the law as it existed prior to the amendment."[2]

The Kansas Workers Compensation Act does not define "reckless" or "willful."

In *Carter,*[3] the Kansas Court of Appeals quoted *Bersch*,[4] in holding that:

> the meaning of the word "willful," as used in the statute, includes the element of intractableness, the headstrong disposition to act by the rule of contradiction. . . . "Governed by will without yielding to reason; obstinate; perverse; stubborn; as, a willful man or horse." (Webster's New International Dictionary.)

The Kansas Court of Appeals recently held that under K.S.A. 21–3201, criminal conduct may be either intentional or reckless; it cannot simultaneously be both.[5]

Until July 1, 2011, Kansas criminal law defined reckless in K.S.A. 21-3201(c):

> Reckless conduct is conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger. The terms "gross negligence," "culpable negligence," "wanton negligence" and "wantonness" are included within the term "recklessness" as used in this code.

The 2010 Legislature amended K.S.A. 21-3201 at L. 2010, ch. 136, sec. 13, effective July 1, 2011. K.S.A. 21-3201 is codified in K.S.A. 2011 Supp. 21-5202, which states in part:

> (j) A person acts "recklessly" or is "reckless," when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

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[2] *Hughes v. Inland Container Corp.*, 247 Kan. 407, 414, 799 P.2d 1011 (1990).

[3] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 85, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[4] *Bersch v. Morris & Co.*, 106 Kan. 800, 804, 189 Pac. 934 (1920).

[5] *State v. Johnson*, ___ Kan. App. 2d ___, 265 P.3d 585 (2011).

K.A.R. 51-20-1 provides:

> The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

In *Foos*,[6] the Kansas Supreme Court held: "Once the claimant has met his or her burden of proving a right to compensation, the burden of proving an employer's relief from that liability through K.S.A. 44–501(d)(2) is upon the employer."

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

ANALYSIS

Respondent provided claimant with safety equipment, including a safety harness, lanyard and rope. Claimant was instructed to use a safety harness, belt, lanyard and rope whenever he worked in a tree above ground. When claimant fell, he was wearing a safety harness but was not using a rope, nor was he "lanyard in." He says that he had unhooked his lanyard to reposition himself in the tree.

> A. [by claimant] I had positioned myself from the tree. I unclipped. Positioned myself down on the limb. Went to flip my lanyard. When I did that, the saw pulled me to the side because the saw holds to the side, pulled me to the side. Spun me off the limb like this and I was hanging in the air and I held on for dear life until my arms gave away and I hit the power line and I hit the ground.
>
> Q. [by respondent's attorney] Okay. So let me ask you this. You were lanyarding into the limb you were going to cut?
>
> A. Yes.
>
> Q. And that's when you fell?
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> A. Yes.[9]

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[6] *Foos v. Terminix*, 277 Kan. 687, Syl. ¶ 2, 89 P.3d 546 (2004).

[7] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[8] K.S.A. 2010 Supp. 44-555c(k).

[9] P.H. Trans. at 32-33.

However, Mr. Doyle said that he witnessed claimant fall and when he went over to claimant after claimant hit the ground, claimant's lanyard was doubled up and clipped to his harness, which indicated it was not being used. Mr. Bauschka likewise observed this.

The statute (L. 2011, ch. 55, sec. 3) contains a different standard or test for disallowing compensation if the injury results from an employee's failure to use safety protection or a guard versus an employee's violation of a safety rule or regulation. These two provisions can overlap. For example, claimant was provided safety equipment for his protection. He was also told when to use it. Such instructions, coming from a supervisor, should have the force of a rule. And if so, then as a result, respondent's burden is to show a reckless violation as opposed to a willful failure. Although neither term is defined in the Kansas Workers Compensation Act, willful is a step or degree beyond reckless.

In this case, claimant recklessly violated respondent's workplace safety rule concerning the use of safety equipment provided for his protection. Under the circumstances presented, his failure to use that equipment was also willful.

CONCLUSION

Claimant willfully failed to use the safety protection provided to him by respondent and recklessly violated respondent's safety rule concerning when and how such equipment is to be used.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated January 5, 2012, is reversed.

IT IS SO ORDERED.

Dated this _____ day of February, 2012.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Daniel L. Smith, Attorney for Claimant
Michael T. Halloran, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge